In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1988

TEXAS CITY DIKE & MARINA, INC., PETITIONER

v.

PETER J. BRENNAN, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing the district court's judgment that petitioner's business, which derived 57 percent of its income from the sale of boats, motors and trailers, was an "amusement or recreational establishment" within the exemption from the minimum wage and maximum hours provisions of the Fair Labor Standards Act.

This action was brought by the Secretary of Labor to enjoin petitioner from violating the Act's minimum wage, overtime, child labor and recordkeeping requirements and to require payment of back wages under the Act. Petitioner operates an establishment in Texas City, Texas, in which it sells boats, motors, and trailers, it repairs, stores, and rents boats and it provides dock facilities, motor fuel, and related services (Pet. App. A, p. 2a). In 1970, the year in question, the sale of boats, motors,

and trailers accounted for 57 percent of the establishment's income from all sources (*ibid.*). Together with the income from parts sold in the repair of boats, motors, and trailers, such sales accounted for 68 percent of all sources of income (*ibid.*).

It was stipulated that petitioner had not complied with the minimum wage and maximum hours requirements of the Act in 1970 and 1971, and the only issue is whether petitioner was subject to the Act in 1970. The district court ruled that in 1970 petitioner's business was exempt from the wage standards of the Act as an "amusement or recreational establishment" under the provisions of Section 13(a)(3) of the Act. The court of appeals reversed on the ground that the principal activity of the business was the sale of boats, motors, and trailers, and that it was therefore not an "amusement or recreational establishment" (Pet. App. A, pp. 9a-10a).

1. Since the petitioner's establishment was engaged in a "varied mixture of activities" (Pet. App. A, p. 9a), some of which could be thought to be "amusement or recreational" and others not, it was necessary for the court of appeals to determine petitioner's exemption status on the basis of its principal activity. The legislative history of the exemption specifically indicates that the "principal" or "primary" activity of an establishment was intended to be determinative. 112 Cong. Rec. 11366-11367.

The court of appeals correctly held the establishment's principal activity to be the sale of boats, motors, and trailers (Pet. App. A, p. 10a), since that activity alone accounted for more than all the other operations taken together. Dollar volume is an appropriate criterion for assessing the relative significance of the components of a commercial enterprise, and is used by the Act in anal-

ogous contexts such as qualification for the retail exemption in Section 13(a)(2), 29 U.S.C. 213(a)(2), and for enterprise coverage in Section 3(s), 29 U.S.C. 203(s). Petitioner has at no time suggested data based on other possible criteria that would lead to a different result in determining its principal activity. Such data, if they existed, were peculiarly available to petitioner, who, as claimant of a special exemption, has the affirmative burden of showing that it is "plainly and unmistakably within [the] * * * terms and spirit" of the exemption. *A. H. Phillips, Inc.* v. *Walling*, 324 U.S. 490, 493; see *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392. It adduced no such data, however, and submitted the issue on the basis of an agreed stipulation of facts including data for income only (Pet. App. A, p. 2a, n. 3).[1]

In view of the character of its principal activity, petitioner's business was properly held not to be an "amusement or recreational establishment." The express purpose of Section 13(a)(3) was to exempt "such seasonal recreational or amusement activities as amusement parks, carnivals, circuses, sports events parimutuel racing, sport boating or fishing, and other similar or related activities * * * ." H. Rep. No. 871, 89th Cong., 1st Sess., p. 35. The sale of boats, motors and trailers no more constitutes operation of "amusement parks" and "carnivals" than does the sale of Ferris wheels, carousels, or pinball machines. The sale of expensive mechanical and structural equipment is a distribution activity, not a recreational activity; and, as the court of appeals noted, because it is not a labor-intensive business, as are amusement parks and carnivals, it does not have the same need for cheap

[1]Petitioner contends that the "sales test" adopted by the court is unfair and is inconsistent with the seasonality test established by the Act, which applies to receipts during the preceding calendar

labor (Pet. App. A, p. 10a). The decision below, moreover, is consistent with the settled rule that the exemptions of the Act "are to be narrowly construed." *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295.[2]

2. Petitioner's claim that as a matter of due process the sales test adopted by the court in construing Section 13(a)(3) could only have been imposed through rule-making is without merit. Cf. *National Labor Relations Board* v. *Bell Aerospace Co.*, No. 72-1598, decided April 23, 1974, slip op. pp. 23-28; *id.*, slip op. p. 1 (White, J., concurring in part).

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year (29 U.S.C. 213(a)(3)) rather than the year for which liability is being asserted. However, since petitioner submitted, in support of its claim of exemption, data on receipts for the current year, but not the preceding year, the court of appeals had little choice but to rely on current data and could reasonably assume that it was representative.

[2]Petitioner's reliance upon *Commissioner* v. *Duberstein*, 363 U.S. 278, as support for the contention that the court of appeals erred in not applying the "clearly erroneous" rule (Pet. 11-13), is misplaced. The Court in *Duberstein* carefully limited its decision to the question before it, whether particular property transferred to a taxpayer was a "gift" within the meaning of a particular provision of the Internal Revenue Code excluding gifts from gross income. The Court held that, in view of "[t]he nontechnical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements, with their various combinations, creating the necessity of ascribing the proper force to each, * * * primary weight in this area must be given to the conclusions of the trier of fact" (363 U.S. at 289), whose findings must stand unless "clearly erroneous." *Id.* at 291. This conclusion, said the Court, was "implicit in the present statutory treatment of the exclusion for gifts, and in the variety of forums in which federal income tax cases can be tried." *Id.* at 290. Since these factors are not present here, the rationale of *Duberstein* is inapplicable.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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